Supreme Court, U.S.
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No. 99-2034

IN THE

Supreme Court of the United States

JEFFREY SENECHAL,

Petitioner,

v.

JANE DOE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MASSACHUSETTS SUPREME JUDICIAL COURT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RICHARD E. BRODY
Counsel of Record
BRODY, HARDOON, PERKINS & KESTEN
One Exeter Plaza
Boston, Massachusetts 02116
(617) 880-7100

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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QUESTIONS PRESENTED

I. Whether the March 20, 2000 interlocutory order by the Massachusetts Supreme Judicial Court is a "final judgment or decree" for purposes of 28 U.S.C.S. § 1257.

II. Whether the March 20, 2000 decision by the Massachusetts Supreme Judicial Court is based upon independent, separate, non-federal grounds thereby depriving the Supreme Court of the United States of jurisdiction.

III. Whether the Petitioner has set forth a substantial federal question given the previous decision of the Supreme Court of the United States in *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964).

IV. Whether the Massachusetts Supreme Judicial Court appropriately applied the "in controversy" and "good cause" requirements of Rule 35 of the Massachusetts Rules of Civil Procedure.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Rule 10 of the Supreme Court Rules, Consideration Governing Review on Certiorari, provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a depar-

ture by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

28 U.S.C.S. § 1257, State Courts; Certiorari, provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn into question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purpose of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

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R. Stern, E. Gressman, S. Shapiro,
& K. Geller, *Supreme Court Practice*,
141 (7th ed. 1993) 14

STATEMENT OF THE CASE

Petitioner, Jeffrey Senechal, (hereinafter "Senechal"), a mental health counselor, is alleged to have engaged in tortious sexual conduct impregnating Jane Doe (hereinafter "Doe"), while she was an in-patient at West Lake Academy (hereinafter "West Lake").[1] He has been ordered to undergo a physical examination pursuant to Rule 35 of the Massachusetts Rules of Civil Procedure (hereinafter "Mass. R. Civ. P. 35") in order to complete DNA testing comparison with Doe and the baby born to Doe. He contends that this order violates the Fourth Amendment to the United States Constitution and, alternatively, that Doe failed to satisfy the Rule 24 requirements of "in controversy" and "good cause".

Doe was committed to West Lake Academy, a Commonwealth of Massachusetts Department of Mental Health (hereinafter "DMH") intensive residential treatment program (hereinafter "IRTP") for mentally ill adolescents[2] operated under contract by Health & Education Services, Inc. (hereinafter "HES"). She had suffered from severe sexual and physical abuse and had been removed from the

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[1] Doe also brought claims against West Lake Academy, Health & Education Services, Inc. (a subsidiary of North East Health Systems, Inc. which owned and operated West Lake Academy), Robert Johnston, Donald Mosher and Ed Hovestadt, employees and administrators for Health & Education Services, Inc.

[2] "Mentally ill adolescent" for purposes of 104 CMR 2.14 is an adolescent whose mental illness is characterized by a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life, but shall not include alcoholism.

custody of her mother. Defendant, Robert Johnston described her at his deposition:

> [S]he really is a severe survivor of sexual abuse. She has some pretty unsafe ideas about herself and her behavior.
>
> Abuse reactive kids tend to identify with their aggressor and produce behaviors to appease or appeal to or mimic their aggressor. It's the defensive style that some kids get into and [Doe] showed those kinds of characteristics.

One month prior to leaving the program, West Lake arranged for Doe to make weekend visits home to Maine. West Lake arranged for transportation by bus from Boston to Maine. West Lake also allowed Senechal, a mental health counselor, to transport the plaintiff, alone, to the bus station for these visits. While transporting Doe, Senechal engaged in sexual contact, including intercourse, with Doe.[3] Doe was medicated on each occasion due to her psychiatric condition.

Immediately after her transfer, West Lake discovered the sexual assault and reported it to the Department of Social Services ("DSS"). West Lake did not report the counselor's assault to local law

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[3] Petitioner previously transported Doe alone to a medical/dental visit during which he inappropriately touched her.

enforcement. DSS "screened out"[4] the report the next day without conducting any interviews or investigations. Contrary to the implication in Petitioner's statement of facts, DSS did not make any determination in response to the report. State regulations specify those situations in which the agency can "screen out" a report, including situations where DSS has no reason to suspect that the child is still at risk of ongoing abuse. When West Lake made the report, Doe had been transferred back to Maine to a less secure facility.

Shortly after being transferred to a less secure facility in Maine, Doe learned she was pregnant. Eight months later, a child was born and adopted by a third party. Doe identified Senechal as the father. She testified that he was the only man with whom she had sexual contact during the relevant time period, that is, conception.[5]

The Maine Department of Human Services reported to DMH which then investigated the matter. The investigation focused on the dates of alleged contact. At least one date, June 18, 1995, according to the DMH report, was "within reason" as a conception date given Doe's pregnancy test

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[4] "Screening out" is distinctly different from dismissal or a final determination. The various permissible responses by DSS are set forth in 110 CMR *et. seq.*

[5] Petitioner's Statement of the Case does not mention this point, nor the fact that Doe had denied to the DMH investigator that she had sexual relations with any other man, as was reportedly suggested by her mother.

result.[6] Senechal and Doe were alone at the time of conception. DMH concluded:

> With no objective, third-party or consistent evidence to serve as an intercessor, [Doe's] and Mr. Senechal's clashing testimonies make it impossible to determine beyond doubt what actually transpired on June 18.

Ultimately, while DMH could not determine beyond a "reasonable doubt" whether the assault occurred on that date, it concluded that Doe's human rights were violated and she was subjected to a potentially abusive situation. In addition, DMH recommended that:

> It would be prudent for Mr. Senechal to agree to taking part in a test that would determine whether he is the father of [Doe's] child. That test, as outlined by the investigator by the Boston University Center for Human Genetics, would involve the painless scraping away of cells from inside the cheeks....

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[6] Petitioner argued before the Supreme Judicial Court that the date of conception of the child could not be determined with certainty because Doe had not produced records in response to his discovery requests. Because he had not raised this issue in the Superior Court, the Supreme Judicial Court did not address it (A. 17a). Doe submits there was evidence of the conception date before the Superior Court which Petitioner did not challenge. He attempts to raise that same issue here (Petition, p. 23). Again this assertion is unsupported and is not properly before this Court for consideration.

Senechal refused to undergo this testing. Without this corroborating evidence, DMH was unable to say whether Senechal fathered the baby and whether he had sexually abused Doe.

Senechal testified that he recalled transporting Doe. He recalled that on one occasion he was caught in traffic and pulled over to a rest area with Doe, spending time there while waiting for traffic to clear. He also recalled that he stopped several times to do errands. Senechal neglected to tell DMH about these instances.

Senechal temporarily left HES shortly after the sexual incidents involving Doe. Shortly thereafter, he was rehired as the director of a program providing services to male and female homeless adolescents at risk, despite the outstanding allegations and the then ongoing DMH investigation. When the DMH report was subsequently issued to HES, defendant Robert Johnston, told Senechal that, if the DMH recommended test was positive for paternity it would indicate that:

> He had sex with her in all likelihood while at West Lake. She would have been a minor. That would have been statutory rape. That would have been abuse of a client and at the very least, that would mean that he would no longer remain in our employment.

Senechal responded by persisting in his refusal to participate in paternity testing and continued in his employment with HES. His refusal continues to date.

Senechal denies that he had sexual intercourse with Doe or that he is the father of the child later born to her, and has affirmatively taken the position that at least two other men might be the father of her child. He specifically acknowledges that the matter of his paternity is at issue, stating that "on the issue of liability," a Mr. Bryant, the man Doe was living with at the time of the birth of the child, "very likely" fathered the child. In a similar vein, his answer to the complaint includes, as an affirmative defense, that Doe's damages were caused by a "third person."

Senechal was asked to take a paternity test after this lawsuit was filed. He refused to do so, without explanation.

Trial has yet to be scheduled on the merits of the case which include claims by Doe against the various defendants for negligence and violation of her state and federal civil rights.

In January, 1999, Doe moved, pursuant to Mass. R. Civ. P. 35, to compel Senechal to undergo a physical examination. The scope of the physical examination was limited to a buccal swab paternity test.[7] Senechal opposed.

On May 14, 1999, the Superior Court for the Commonwealth of Massachusetts issued a Memorandum of Decision and Order on the Motion, holding that (1) the defendant's condition as father of the child was "in controversy" for purposes of Rule 35 and that "good cause" for the examination existed, as required by that Rule; and that (2) it was not clear that the request implicated the

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[7] This test involves the rubbing of a "q-tip" or swab on the interior surface of the cheek.

Fourth Amendment at all, but even if it did, the proposed test was "reasonable" within the meaning of the Fourth Amendment. It allowed Doe's motion to compel the buccal swab paternity test as described in the literature attached to that Motion.

Senechal filed a Petition under Massachusetts General Laws c. 231, § 118 in the Appeals Court for the Commonwealth, seeking interlocutory review and relief from the Superior Court order. Doe opposed the petition on the grounds that the trial court properly found that she had satisfied the requirements of Rule 35 in requesting that Senechal undergo the test, and that, even if implicated, the test did not violate the Fourth Amendment.

By Order dated June 24, 1999, a Single Justice of the Appeals Court (Lenk, J.) denied Senechal's petition for interlocutory relief, but permitted him to take an interlocutory appeal to the full panel. Pursuant to Rule 11 of Massachusetts Rules of Appellate Procedure, Doe requested direct appellate review by the Supreme Judicial Court. The Massachusetts Supreme Judicial Court allowed that request.

On March 20, 2000, the Massachusetts Supreme Judicial Court unanimously affirmed the Superior Court order allowing the Rule 35 physical examination of Senechal for the purpose of completing a buccal swab paternity test. It held that the motion judge had properly concluded that Doe made the necessary showing under Rule 35 that Senechal's condition as the putative father of her child was "in controversy" and that

there existed "good cause" to compel the examination. (A. 19a-22a). The Supreme Judicial Court noted that the trial judge had broad discretion in determining whether to order a physical examination pursuant to Rule 35, and there had been no abuse of that discretion. (A. 22a). As for the Fourth Amendment, the Supreme Judicial Court stated that Senechal had not provided any authority for his proposition that it applied in this context to civil litigation concerning private litigants and specifically cited the holding in *Schlagenhauf* v. *Holder*, 379 U.S. 104, 114 (1964) that "Rule 35... is free of constitutional difficulty." (A. 23a). The Court held that, even if the Fourth Amendment were to apply, the physical examination ordered, the buccal paternity test, would meet the standard of reasonableness. (A. 24a).

Senechal filed this petition to obtain review of the decision of the Supreme Judicial Court affirming the order allowing Doe's motion to compel a buccal swab paternity test.

REASONS FOR DENYING THE WRIT

I. No Compelling Reason Exists Warranting This Court's Review On Writ Of Certiorari.

Review on a writ of certiorari is a matter of judicial discretion. It will be granted only when "compelling reasons" exist. The "compelling reasons" for review of a state court decision exist where (1) a state court of last resort has decided an important federal question in a way that con-

flicts with the decision of another state court of last resort or of a United States court of appeals; or (2) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of the Court. U.S. Sup. Ct. R. 10. No such compelling reasons exist in this case. The Supreme Judicial Court upheld the trial court's discovery order upon application of state law and the Massachusetts Rules of Civil Procedure. No conflict among the state or federal circuits is presented. The Petition should be denied.

II. There Is No "Final Judgment Or Decree" Sufficient To Trigger This Court's Certiorari Jurisdiction.

The jurisdiction of this Court, under 28 U.S.C. § 1257, to review a decision of a state court depends upon the existence of a final judgment or decree by the state court. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476-477 (1975). This finality requirement is designed to (1) avoid piecemeal review of state decisions, (2) avoid the rendering of advisory opinions in cases where there may be no real case or controversy, and (3) assure that this Court does not unnecessarily intrude into state affairs. *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973), citing *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945).

A state court judgment or decree is only final for purposes of review by this Court if (1) it is subject to no further review or correction in any other state tribunal, and (2) it is effective determination of litigation and not merely interlocutory or an intermediate step therein. *Market Street R. Co.* v. *Railroad Comm'n of Cal.*, 324 U.S. 548, 551, *reh'g denied*, 324 U.S. 890 (1945). This Court has also found "finality" in a small class of cases where there has been (1) a final assertion of jurisdiction, with no further review of that issue possible in state courts; (2) a threat of serious erosion of national policy, and (3) a state judgment on an issue anterior to and separable from the merits, and not enmeshed in the factual controversies of the case. *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120 (1945) (conflict between courts of two different governments); *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963) (appropriate venue to entertain action against national bank); *Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542, 550 (1963) (jurisdiction of state court to issue injunction in unfair labor practices case); and, *Rosenblatt* v. *American Cyanamid Co.*, 86 S.Ct. 1, 7 (1965) (issue of personal jurisdiction anterior to and separable from merits) and *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975)(determination of federal issue by the Supreme Court will terminate the litigation).

The subject of this Petition is an interlocutory, intermediate discovery order involving application of a state procedural rule in a civil case. Review of such intermediate rulings is allowed only in ex-

ceptional circumstances. Indeed, even if a federal issue is finally decided on an interlocutory appeal in the state courts, it does not necessarily qualify for immediate review. *Flynt* v. *Ohio*, 451 U.S. 619, 622 (1981). Only where there is real danger present of some irreparable injury to important constitutional concerns or federal policies, such as occurred in *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983), *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), and *Construction Laborers* v. *Curry*, 371 U.S. 542 (1963), will there be exceptional circumstances warranting review. There is no such "real danger" presented in this case and review of the intermediate state court order is not warranted.

Rather, where definitive disposition has not been made of all the legal and factual issues in this case, the exercise of this Court's certiorari jurisdiction would necessitate a piecemeal review of, and interference with, ongoing state litigation. Furthermore, the order in this case is enmeshed in the particular factual issues presented, and it affects only these litigants in the present case. A determination of "good cause" and "in controversy" as required by Mass. R. Civ. P. 35 necessarily requires an examination of and reliance upon factual issues. Dispositive motions have not been heard and trial has not taken place. The interlocutory order at issue resolves only one discovery issue as to only one defendant.

Moreover, jurisdiction does not lie where the "remaining litigation may raise other federal questions." *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. at 127, *North Dakota State Board of Phar-*

macy v. *Snyder's Drug Stores, Inc.*, 414 U.S. at 163. There are additional claims against all of the defendants, including violation of Doe's federal civil rights. The ongoing litigation may entail further appellate review, including appellate review of federal constitutional issues. The alleged constitutional issues should not be addressed until the trial court's proceedings are finally concluded, the record complete, and the state appellate courts have completed their review of the trial court record. *Minnick* v. *California Dept. of Corrections*, 452 U.S. 105, 127 (1981).

This Court dismissed a writ of certiorari as improvidently granted for want of jurisdiction in a similar procedural scenario in *Jefferson* v. *City of Tarrant*, 118 S.Ct. 481 (1997). In that case, the state's highest court answered a single certified question that affected only two of four counts in the complaint. The case lacked the finality required for review by this Court.

The possibility that matters left open may generate additional constitutional questions requires a finding that finality does not exist and that the matter is not ripe for review. *See generally Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 72 (1948) (finality requirement not met merely because major issues have been decided by highest state court). So, too, where the order at issue is enmeshed in the factual controversies of the case and the factual record is not complete, review is not appropriate. *Jefferson* v. *City of Tarrant*, 118 S.Ct. at 486 (1997). To accept certiorari at this stage of the litigation will only create the risk that subsequent state proceedings may generate addi-

tional federal questions, requiring piecemeal federal review, and potentially interfering with the ability to review related federal questions arising out of a single case. It will serve to delay justice and cause economic waste. *Radio Station WOW* v. *Johnson*, 326 U.S. at 124.

The finality requirement "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. at 124. Where that requirement has not been met, the Petition for Writ of Certiorari should be denied.

III. The State Court Decision Is Based Upon Adequate And Independent Non-Federal Grounds And Therefore There Is No Jurisdiction.

The Petitioner implies that the Fourth Amendment argument was his primary argument before the Supreme Judicial Court in opposition to the Rule 35 examination and that the Fourth Amendment analysis was the first prong of that Court's decision. This impression is erroneous. Petitioner's "first" argument to the Supreme Judicial Court was that the trial judge had abused his discretion by ordering a physical examination under Mass. R. Civ. P. 35. (A. 17a). That rule of civil procedure in state court cases permits a judge to order any party to submit to a physical examination by physician only if his physical condition is "in controversy" and if the

moving party has established "good cause" for the test to proceed. Following an analysis of Mass. R. Civ. P. 35 and its application to the facts submitted to the Superior Court, the Supreme Judicial Court held that the Superior Court judge had not abused the broad discretion accorded him in discovery matters in ordering the test. This holding was the primary basis for the Supreme Judicial Court's decision, not any Fourth Amendment analysis.

Where a decision rests on adequate state law grounds, review on certiorari is not warranted. *See, e.g.*, R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice*, 141 (7th ed. 1993) (if state court judgment rests on state law grounds, the Supreme Court may have no jurisdiction to review a case; any ruling on the federal question becomes superfluous and incapable of triggering Supreme Court jurisdiction; "[T]he ruling as to the state issue necessarily reduces the case to the vast field of garden variety state court judgments, dealing with state law only.").

In order to determine precisely the ground on which the judgment rests, two questions must be answered: (1) Is the judgment based upon a state ground that is independent and free of entanglement with the federal question? (2) Is that state ground adequate to support the judgment? If, as here, both questions are answered in the affirmative, this Court's jurisdiction fails. Where the state court decision indicates clearly that it is based upon a bona fide separate, adequate and independent state ground, the Supreme Court

will not undertake review. *Michigan* v. *Long*, 463 U.S. 1032 (1983).

The Supreme Judicial Court's decision is based upon the state court rule of civil procedure which is independent and free of entanglement with the Petitioner's federal question, and the state grounds upon which the decision is based is adequate to support the order issued. The Supreme Judicial Court clearly addressed the independent state basis for its decision, after its recitation of facts in the first section of its decision. The Court concluded that the Superior Court judge had not abused his discretion in ordering the Petitioner to undergo a physical examination under Mass. R. Civ. P. 35. Only *after* reaching this conclusion on independent state grounds, Mass. R. Civ. P. 35, did the Court turn to the Petitioner's allegation that the examination was prohibited by the Fourth Amendment. Reliance by the Court on the application of state law was clearly independent and separable from any discussion of the Fourth Amendment.

Moreover, contrary to Petitioner's assertion otherwise in the Petition (at p. 6), the Supreme Judicial Court did not hold, as a matter of law, that the Fourth Amendment did not apply to civil actions between private litigants. Rather, it stated that "[t]he civil litigation here concerns private litigants, and Senechal [the Petitioner] points to no authority for his proposition that the Fourth Amendment had any application in this context." (A. 23a). His argument to the Court, therefore,

was without support.[8] The Supreme Judicial Court did note, as an aside, that this Court, in *Schlagenhauf* v. *Holder*, 379 U.S. 104, 114 (1964), had held that the analogous Federal Rule of Civil Procedure Rule 35 was "free of constitutional difficulty." (A. 23a). It further stated that, "in any event," the examination here "would meet the standard of reasonableness." (A. 24a). In so stating, it referenced in a footnote "a scattering of reported decisions where courts have declined to decide whether the Fourth Amendment applies to civil discovery orders among private litigants, but have nevertheless considered the 'reasonableness' of the discovery order." (A. 24a and cases cited).

Where the decision clearly rested on the application of Mass. R. Civ. P. 35 to a particular examination in a particular case, and not on any Fourth Amendment analysis, this Court's review is unwarranted. The Petition should therefore be denied on this basis.

IV. There Exists No Substantial Federal Question And Therefore The Petition Should Be Denied.

The question whether an order to undergo physical examination to obtain a DNA sample under Mass. R. Civ. P. 35 violates the Petitioner's right to privacy under the Fourth Amendment, has been explicitly foreclosed by the prior decision of this Court in *Schlagenhauf* v. *Holder*, 379

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[8] It still is. Petitioner has provided no cases demonstrating that the Fourth Amendment even applies in this context.

U.S. 104 (1964). The federal issue is, therefore, insubstantial, and the petition for review by this Court should be denied. *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 311 (1902); *Zucht* v. *King*, 260 U.S. 174, 176 (1922); *Palmer Oil Corp.* v. *Amerada Corp.*, 343 U.S. 390, 391 (1952).

In *Schlagenhauf*, this Court was asked to review a federal court's application of the "in controversy" and "good cause" requirements of Federal Rule of Civil Procedure 35. The co-defendants' answer alleged that the petitioner was negligent in that he was unfit medically and psychiatrically to operate a tractor trailer. The co-defendants sought an order allowing both mental and physical examinations by one specialist in each of the following fields: internal medicine (necessarily involving a touching of and testing of the physical person), ophthalmology; neurology and psychiatry.[9] The petitioner in that case argued that he was a defendant, that his physical and mental condition was not in controversy, and that application of Rule 35 to him, as a defendant, would be an unconstitutional invasion of his privacy. So, too, Petitioner here argues that

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[9] Petitioner minimizes the breadth and scope of the examinations in *Schlagenhauf*, claiming that the testing was "standard" in comparison with the swabbing of the inside of his cheek with a q-tip. He now asks that this Court essentially reverse *Schlagenhauf* because the specific test which he has been ordered to undergo is "new" and was unforeseen by this Court at the time of the *Schlagenhauf* ruling. The *Schlagenhauf* decision, however, did not limit its ruling to only certain types of mental and physical tests or to only those tests available or knowable by this Court in 1964. Certainly, blood tests and cultures as part of an internal medicine exam were contemplated in 1964. Petitioner is unable to distinguish those from the q-tip swabbing of the inside of his cheek.

the Rule 35 examination of him, an unwilling defendant, is an unconstitutional invasion of his privacy. The *Schlagenhauf* court noted its earlier decision in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941) wherein they held that "Rule 35 could not be assailed on constitutional grounds". The Court, in *Schlagenhauf*, reiterated that:

> Rule 35, as applied to either plaintiffs or defendants to an action, is free of constitutional difficulty and is within the scope of the Enabling Act. We therefore agree with the Court of Appeals that the District court had power to apply Rule 35 to a party defendant in an appropriate case.

Id. at 240.

Schlagenhauf thus disposes of any argument by Petitioner that, as a defendant, he cannot be compelled to submit to a physical examination, and that Rule 35 can only be invoked against plaintiffs. *Id.* at 240 ("[i]ssues cannot be resolved by a doctrine of favoring one class of litigants over another"). The *Schlagenhauf* Court accepted the petition in order to set guidelines for application of F.R.C.P. 35 to particular cases. The Court noted that discovery rules are to be accorded a broad and liberal treatment to effectuate their purpose; that "civil trials in the federal courts no longer need be carried on in the dark," citing *Hickman* v. *Taylor*, 329 U.S. 495, 501 (1947). The Petitioner here argues for darkness.

Petitioner argues that to submit to such an examination is to allow an invasion of his person and that the threatened dissemination of results of that examination further aggravates the violation of his right to privacy. He seems to argue that under no circumstance may a defendant be compelled to undergo a physical examination during which his physical being is touched or through which a diagnosis of any condition may be made. These arguments have all been rejected by this Court.

The *Schlagenhauf* Court was careful to note that any claimed error in the application of the guidelines for Rule 35 to a particular case, once set, would not automatically be grounds for review. The Massachusetts Rule of Civil Procedure is almost identical to that of the federal civil rule. It requires that the judge determine that the mental or physical condition is "in controversy" and that there be "good cause" for the requested examination. The Supreme Judicial Court relied upon *Schlagenhauf*, by analogy, in analyzing and applying the requirements of the state procedural rule.

To the extent that Petitioner now asks this Court to review the Supreme Judicial Court's analysis and conclusion that the requirements of Rule 35 were satisfied in this case or that its analysis of "reasonableness" was faulty, such request is clearly not one warranting review on certiorari. The resolution of that issue implicates issues important only to this case and its parties. Certiorari typically only is granted in cases involving principles which are important to the public

as distinguished from the parties. *See Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955). A petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule. U.S. Sup. Ct. Rule 10. In any event, the state court properly found that the requirements of Rule 35 were met.

V. The Massachusetts Supreme Judicial Court Properly Affirmed The Order That Petitioner Undergo The Physical Examination.

1. The Court Properly Determined That The "In Controversy" And "Good Cause" Requirements Of Rule 35 Were Satisfied.

Doe alleges that Petitioner engaged in tortious sexual conduct with her claiming assault and battery against him. In support of her Rule 35 motion, Doe produced testimony that the Petitioner was the only person with whom she was sexually involved at the relevant time. In addition, there was evidence developed by DMH that, during the relevant time for conception, the Petitioner, improperly, had been alone with Doe during transport to the bus station and on a medical visit. Shortly thereafter, Doe learned she was pregnant. Petitioner denies any sexual contact with Doe, and denies paternity of the child.

Doe claims damages as the result of the sexual assault, the resulting physical injury, the pregnancy, and the permanent emotional distress she has and will continue to sustain. Thus, her claims relate not only to the sexual intercourse and the physical assault, but also to her pregnancy and the birth of the child fathered by Petitioner. The Petitioner's physical examination, therefore, bears substantially not only on the assault claims but on the claims for damages. The Supreme Judicial Court properly concluded that, given these circumstances, Doe met her burden of demonstrating that the Petitioner's condition was "in controversy," one prong of the required showing for a Rule 35 examination. (A. 19a).

Apart from Doe's affirmative showing of the "in controversy" requirement on the unique facts of this case and Petitioner's denial of each claim, the record reflects instances of affirmative conduct on Senechal's part by which *he* has placed his paternity status "in controversy":

1. He has asserted in pleadings that another man is the child's father. In so doing, he specifically acknowledges that the matter of his paternity is at issue, stating that "on the issue of liability," a Mr. Bryant "very likely" fathered the child. In a similar vein, his answer to the complaint includes, as an affirmative defense, that the plaintiff's damages were caused by a "third person." *See Schlagenhauf, supra* (matter may be placed in controversy by defense);

2. Petitioner has refused the recommendation of DMH to submit voluntarily to testing; and

3. Petitioner attacks Doe's allegations as being "uncorroborated," and "unsubstantiated" and claims that paternity is solely a credibility issue.[10] But this line of argument only further evidences that his paternity status is "in controversy," and further supports the judge's decision to compel the buccal swab test for comparison testing. The Supreme Judicial Court noted that if Doe can demonstrate through reliable evidence that Petitioner is the father of the child, conceived while she was under his supervision, she would prove that an intentional touching had taken place, one of the elements of assault and battery. Such a test would provide an objective basis by which to evaluate the claim. Petitioner taunts Doe with her inability to corroborate her allegation of assault and yet pleads with this Court to protect him from that effort to corroborate her allegations.[11] The Petitioner's condition clearly is "in controversy."

The Supreme Judicial Court properly ruled that there is "good cause" to compel Petitioner to undergo the buccal swab test noting that confirmation from a DNA profiling method that is recognized as scientifically valid methodology (citing

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[10] It also bears noting that Petitioner's refusal to acknowledge paternity or to undergo paternity testing has benefitted both himself and his former employer, a codefendant. If Petitioner is determined to be the father of the plaintiff's child, then HES and the various supervisory employees responsible for the plaintiff's care, can no longer point to the plaintiff's tortured past as an explanation for her allegations.

[11] The requested examination will also presumably corroborate Senechal's denial of the physical assault.

Commonwealth v. *Vao Sok*, 425 Mass. 787 (1997)) would go far in assisting the trier of fact to determine Petitioner's liability. "The results of such a test cannot be viewed as collateral."[12] (A. 21a).

Contrary to Petitioner's argument, he has not been ordered to undergo "DNA testing", testing that would reveal a significant amount of genetic identity information and "all of the information unique to the creation of an individual", him. He has been ordered to undergo one test using DNA analysis to answer one question; whether he is the father of the child born to Doe. This very limited, discrete test, the buccal swab test, at issue is not the broad sweeping DNA testing described in Petitioner's submission. A challenge to such hypothetical testing does not present a justiciable case or controversy. Petitioner's hysteria is ill-placed. He ignores the availability of confidentiality agreements and orders of impoundment common to protecting sensitive privileged information in civil cases. He did not request that the Superior Court alternatively protect him from disclosure of the results of the test nor did he request similar relief from the Supreme Judicial Court. His concern regarding disclosure is new founded

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[12] Defendant argues that results of paternity tests are not in and of themselves evidence of intercourse nor conclusive of paternity, citing *Commonwealth* v. *Beausoleil*, 397 Mass. 206 (1986). *Beausoleil* is not a DNA testing case, but a blood grouping case. Since 1986, there have been many cases in which DNA testing has been discussed and endorsed as being so scientifically reliable that it can alone prove or disprove criminal liability in some cases. See *GEB* v. *SRW*, 422 Mass. 158 (1996) (genetic marker tests showed 99.8 % probability of paternity). Indeed, the scientific value of the collection and analysis of DNA is not questioned. *Commonwealth* v. *Vao Sok*, 425 Mass. 787 (1997).

and easily resolved by a variety of means available to civil litigants.

The case which Petitioner describes as "most factually similar to the present case," *State ex rel. C.S.* v. *Dowd*, 923 S.W.2d 444 (Mo.App.E.D. 1996), is inapposite. In *Dowd*, the court acknowledged that its decision would be otherwise if it was dealing with a request for a test matching DNA or fingerprints to evidence found at the scene which would identify the perpetrator. A positive paternity test establishing that the Petitioner is the father of the child, would be the equivalent of a fingerprint left at the scene indicating he was involved in wrongdoing as to Doe, a mentally ill person placed in his care.

Here, Doe asked for a non-invasive, painless physical exam that will result in a finding of accuracy in excess of 99% in identifying Petitioner as the person who assaulted her, impregnated her and left her with child. The impregnation of the plaintiff is a central issue of the case. Thus, contrary to Petitioner's assertion, the issue is not one solely of credibility.

2. The Court Properly Determined That The Paternity Testing Would Meet the Standard of Reasonableness.

The Supreme Judicial Court noted Petitioner's failure to provide authority for the proposition that the Fourth Amendment was implicated in this case. However, the court noted that even if the Fourth Amendment was implicated somehow,

the required Rule 35 test met the standard of "reasonableness."

In *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) the Supreme Court stated that neither the existence of "probable cause" nor "individualized suspicion" was an absolute prerequisite to the conclusion that a test would be "reasonable" under the Fourth Amendment. *Id.* at 619-620, 624. Nonetheless, here, Doe established such cause by virtue of (1) her deposition testimony that she bore a child, (2) the fact that the Petitioner was the only person with whom she had intercourse during the period when the child was conceived, and (3) the DMH report which isolated one potential date during which both were together for an unspecified time, and identified that date as a possible date of conception given medical testing. That report recommended the buccal swab test.

In *Schmerber* v. *California*, 384 U.S. 757 (1966) this Court examined the "reasonableness" standard in the context of a criminal search and seizure case. The Court noted: "the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner". *Id.* at 768. On the issue of reasonableness, this Court noted that blood tests are "commonplace" in periodic physical examinations, involve a minimal extraction of blood and cause virtually no risk trauma or pain. The *Skinner* Court, citing *Schmerber* v. *California*, 384 U.S. at 771, determined that blood tests do not constitute an un-

duly extensive imposition on an individual's privacy and bodily integrity. *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. at 625. The Petitioner has not even been ordered to submit to a blood test but rather a "q-tip" swabbing of the inside of his cheek.

The Supreme Judicial Court followed the same analysis on this issue as the Michigan Supreme Court in *Bowerman* v. *MacDonald*, 427 N.W.2d 477 (Mich. 1988). In that case the court found that a mother's statement that a putative father was the father of her child, along with testimony that they had engaged in intercourse, was enough to constitute probable cause for Fourth Amendment purposes, to whatever extent that Amendment was implicated. The court determined that to the extent there could be a "search", the blood test was a reasonable one for Fourth Amendment purposes. The court determined that the plaintiff's verified statement clearly placed the matter "in controversy" and provided "good cause" for the motion. *Id.* at 485. *See generally* M.G.L. c. 209C, § 17 (establishing sufficiency of affidavit testimony from mother that sexual intercourse occurred between her and putative father during probable period of conception in order to order blood test or HLA test).The same holds true here. However, Doe offered more than her own sworn testimony. The DMH report constituted an investigation by impartial fact finders who interviewed individuals and, on the basis of their investigation, determined that there was good reason to request that the Petitioner submit to the buccal swab test.

Although Petitioner suggests that the holding in *United States* v. *International Business Machines Corp.*, 83 F.R.D. 97 (S.D.N.Y. 1979), is supportive of his argument, that court held that it strained common sense and constitutional analysis to conclude that the Fourth Amendment was meant to protect against unreasonable discovery demands made by private litigants in the course of civil discovery. The court noted that protection from unduly burdensome or troublesome discovery rests in the rules of civil procedure not the Fourth Amendment.

Petitioner also suggests, for the first time in his petition, that there are actually two searches involved; one the taking of the epithelial cells from inside his cheek, and the other when the actual analysis of data takes place. While an interesting concept, it does not require a different analysis than that set forth set forth in the Supreme Judicial Court's decision.

Petitioner finds fault with the Supreme Judicial Court for failing to identify a governmental interest for ordering the test. The Supreme Judicial Court set forth a complete analysis establishing satisfaction of the Mass. R. Civ. P. 35 requirements. Petitioner appears to be suggesting that every time a Rule 35 exam of a plaintiff or defendant is ordered, or that discovery of privileged materials is sought, a civil court must first identify a legitimate governmental interest at stake. Such a finding would require a sweeping, comprehensive change in the implementation of civil rules of procedure in both state and federal courts.

The court's interest in the truth seeking process is apparently too abstract according to Petitioner. It was not too abstract for the dissenting justices in *Union Pacific Co.* v. *Botsford*, 141 U.S. 250 (1891). In that case, cited by the Petitioner, a female plaintiff objected to a physical examination requested by the defendant. The federal rules of civil procedure were not in place and the court refused to order the examination. The dissenters however noted:

> We believe that trust and justice are more sacred than any personal consideration, and if in other cases, in the interests of justice, or from considerations of mercy, the courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?

Id. at 259.

It is the court, or jury which has to decide the plaintiff's claims against the Petitioner. *See generally Sudwischer* v. *Hoffpauir*, 589 So.2d 474, 476-477 (La. 1991) (Lemmon, J., concurring), cert. denied sub nom, *Estate of Hoffpauir* v. *Sudwischer*, 112 S.Ct. 1937 (1992) (general rules of discovery, and not statute, applied to illegitimate daughter's request for blood sample of siblings in filiation matter and "fundamental fairness prohibits her from keeping this possibly relevant evidence from the court which is to decide plain-

tiff's claim that has been supported by a prima facie showing of filiation.") The intrusion of the buccal swab test upon the Petitioner's physical integrity or privacy is minimal. The Mass. R. Civ. P. 35 requirements satisfy any "reasonableness" standard under the Fourth Amendment.

VI. As A Matter Of Policy, The Testing Of Petitioner Is Proper.

Petitioner complains that his "private" DNA cannot be obtained to undermine his credibility because such a test is not "traditional".[13] Instead, Petitioner argues, to preserve the dignity of privacy rights, "[t]he plaintiff must resort to traditional means to seek to attack defendants' credibility or to seek to bolster her own". It does not stand to reason that Petitioner is able to impose on Doe's constitutionally protected privacy rights and obtain a decade's worth of mental health records in an effort to undermine her credibility with collateral, if not remote, evidence while denying Doe access to a swabbing of the inside of his cheek to obtain highly probative, scientifically reliable, and materially significant evidence, because the former tactic is "traditional" but the latter is not. The proposed testing is considered a "validated technology" in Massachusetts and across the country. *See Landry* v. *Attorney General*, 429 Mass. 336, 350 (1999). There exists no reason why Doe should have to forego the use of

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[13] As discussed *supra*, the DNA evidence in fact goes to much more than an issue of credibility.

this valuable tool or why the trier of fact should be deprived of this very useful evidence.

In addition, here, the alleged tortious conduct affected a mental health patient in a court-ordered setting, operated by a state contractor, a matter clearly of governmental interest. It was the court who committed the plaintiff to this DMH treatment facility where the conduct occurred. The state, and society as a whole, clearly have an interest in protecting those most vulnerable, whose care is entrusted to them.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

RICHARD E. BRODY
Counsel of Record
BRODY, HARDOON, PERKINS & KESTEN
One Exeter Plaza
Boston, Massachusetts 02116
(617) 880-7100